Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

No. 03-814

IN THE

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR T. W. LAQUAY DREDGING, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

To qualify for seaman status under the Jones Act, a worker must have an employment-related connection to a vessel in navigation. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose structure (such as a dredge) is a Jones Act vessel.

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33 U.S.C. § 901, *et seq.* 3

Treatise:

THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (West 4th ed. 2004) 3, 4, 5

I. Interest of T. W. LaQuay Dredging, Inc.[1]

T. W. LaQuay Dredging, Inc. (LaQuay) is a small, family-owned Hub Zone certified dredging and marine construction company located in Port Lavaca, Texas. The company was founded July 15, 2000, and currently owns two 20-foot hydraulic cutter head dredges (the JASON LAQUAY and the JOHN C. LAQUAY), along with five dredge tenders, one tow boat, three anchor barges, a survey boat, and various other pieces of supportive equipment. The dredge, JASON LAQUAY, has combined total horsepower of 3,250, is capable of dredging in excess of 60 feet in depth, and can pump maintenance material in excess of 20,000 feet. The dredge, JOHN C. LAQUAY, has a total combined horsepower of 7,760, is capable of dredging in excess of 60 feet in depth, and can pump maintenance materials in excess of 25,000 feet.

LaQuay files this Amicus Brief in support of Respondent, Dutra Construction Company. This Court's ruling on the legal standards for determining whether a special purpose structure is a moored work platform dredge, will directly affect LaQuay and its employees.

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1. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

II. Statement

A. *Factual Background*

There is no dispute that the Super Scoop is a large floating platform equipped with a clam shell bucket. Pet. App. 16-17. Like all dredges, the Super Scoop operates as a dredge removing silt from the ocean floor. Here, the Super Scoop was used to dig a cross-harbor trench in the Boston Harbor for the Ted Williams Tunnel. *Id.* at 17. The Super Scoop was secured in place during all of its primary operations using traditional anchors and/or cables, or other mooring devices while the Harbor sediment was removed from the ocean floor.

Because the Super Scoop, like many, if not all dredges, is a non-self-propelled structure, it was moved to the work site in Boston Harbor by a self-propelled vessel. Such transport was merely intended to deliver the Super Scoop to the site so that it could perform its primary purpose, to remove soil so a tunnel could be built connecting roads on land. The incidental movement of the Super Scoop was wholly unconnected with navigational commerce, or movement of men or cargo. Based on these facts, the First Court of Appeals correctly determined the Super Scoop was a special purpose structure involved in a construction project, and was not involved in traditional maritime commerce.

B. *Legal Background*

The Longshore and Harbor Workers' Compensation Act is a workers' compensation statute that applies to employees injured in the course of maritime employment upon the navigable waters of the United States and specifically

excludes from its jurisdiction the master or members of a crew of a vessel. 33 U.S.C. § 901, *et seq*.

C. *Issue*

The central issue in this case is whether the Jones Act or Longshore and the Harbor Workers' Compensation Act will apply to an individual employed on a moored dredge working on a road/tunnel construction project in Boston Harbor. The issues central to this debate have been identified and analyzed by both the lower courts and academics. For the reasons set forth below, LaQuay submits that a moored work platform dredge is a non-vessel because: (1) the special purpose structure (dredge) is constructed to be used primarily (if not solely) as a platform; (2) the dredge is moored, anchored or otherwise secured during all its primary operations; and (3) although the dredge is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose. *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 227 (West 4th ed. 2004).[2]

III. Summary Argument

In many ways, this case presents a question of first impression to this Court: When is a moored special purpose work platform (dredge) a vessel, if ever? Or, more to the point, given the facts before this Court: When is a working

2. Much has been alleged about the notion that like a ship at sea, equipment was transported as the Super Scoop was moved into place in Boston Harbor. However, there has been little mention of the fact that the Super Scoop cannot and could not be moved without a tow or other assistance (like a bulldozer being moved to a work site).

dredge anything other than a special purpose structure used in construction projects? Courts have traditionally approached this issue as if building a bridge from opposite banks of a river without a possible chance of meeting in the middle. On one side are the Courts that look beyond the functional purpose of the structure and apply a "vessel test" on a case-by-case basis; they ask how is this structure in any way similar to a vessel? Thus begins a convoluted vessel analysis with arbitrary results. On the other side of the river are the Courts that look largely to the primary purpose of the special purpose structure and apply a non-vessel test; they compare the structure to three common attributes of non-vessels. SCHOENBAUM, *supra*, at 227.

Petitioner has urged this Court to apply a vessel test to the facts of this case and further complicate the jurisprudence. In support of its argument, Petitioner has provided several vessel cases from a number of jurisdictions, all of which handle the issue on a case-by-case basis with arbitrary results. Petitioner has effectively asked this Court to broaden an already convoluted definition of a vessel to include everything that floats, boats or totes. Petitioner's request will merely ensure continued litigation and uncertainty when dealing with special purpose structures.

The fact that a moored special purpose work platform (dredge) *touches* water or floats, does not make it a vessel, as alleged by Petitioner. LaQuay requests that, rather than reviewing these facts under the arbitrary vessel analysis, this Court apply the more established and predictable non-vessel test when determining whether a special purpose structure, such as a moored work platform dredge is a vessel.

IV. Argument and Authorities

A. *Attributes of a non-vessel*

Over time, the Courts have evolved an efficient three-prong test that addresses the non-vessel status issue more directly than the complicated and arbitrary analysis urged by Petitioner:

> (1) the structure is constructed to be used primarily as a platform;
>
> (2) the structure is moored or otherwise secured at the time of the accident; and
>
> (3) although the platform is capable of movement and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose. SCHOENBAUM, *supra*, at 227; *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992) (floating fish processing plant not a vessel in navigation); *see also Daniel v. Ergon, Inc.*, 892 F.2d 403, 407 (5th Cir. 1990), citing *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 831 (5th Cir. 1984) and *Michel v. Total Transp. Inc.*, 957 F.2d 186 (5th Cir. 1992), also following *Bernard*.

This three-part test (hereinafter referred to as the "Schoenbaum Test") is commonly used to determine whether special purpose work platforms are vessels. SCHOENBAUM, *supra*, at 227.[3] LaQuay urges this Court to follow the

3. The issue of non-vessel status is a fact question to be determined on a case-by-case basis. *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132 (9th Cir. 2002).

equitable path of applying the Schoenbaum Test to these circumstances; such an approach is not only equitable but also prevents this Court from meandering through a complicated, inconsistent vessel analysis, adding or subtracting "vessel points" for lights, bows, sleeping quarters, etc.

B. *Moored work platform dredge is a non-vessel*

The Schoenbaum Test provides for simple analysis that is fair and easy to understand. In this case, there is no question that the Super Scoop is constructed primarily as a platform for the purpose of removing earth from the bottom of the bay in order to build a tunnel connecting two highways. The Super Scoop is moored and secured by a series of anchors and cables that hold it in place during excavation. The Super Scoop is only capable of independent movement by using anchors and cables to pivot along the channel during its excavation, and it is moved only slightly faster than glacial speeds across navigable waters when it is in tow. The fact that it was moved from California to perform its function in Boston is merely incidental to its primary purpose. When applying the Schoenbaum Test above, as opposed to the lengthy, arbitrary vessel test, the Super Scoop and other moored special purpose structures are easily identified as non-vessels.

C. *Petitioner's arguments are not definitive*

A finding of non-vessel status can be made despite Petitioner's red herring arguments regarding captains and crews and navigation systems. Petitioner fails to recognize or even address the fact that road crews are often referred to as crews as are many employment-related groups and that

this title has no bearing on Jones Act seaman status. *See* 46 U.S.C. App. 688(a). Additionally, the fact that the Super Scoop has navigation lights does not make it a vessel. Navigation lights are required on docks, floating barges, and lighthouses. Although the navigation lights required by the Coast Guard on the Super Scoop are important for safety purposes, so are the lights on docks and lighthouses designating the shorelines along any navigable waterway. Petitioner's argument regarding GPS systems is similarly flawed. Cars, trucks, and all means of land-based surveyors now commonly use GPS systems. In this particular case, the Super Scoop's GPS system was in place, not so it could find its way back to California, but so it could maintain its position over the channel being dug for the tunnel.

Application of the Schoenbaum Test to these facts efficiently reveals that the Super Scoop, a moored work platform dredge, is a non-vessel. First, it is undisputed that the structure was used primarily as a work platform involved in a construction project. Second, it is undisputed that the Super Scoop was at all times during its primary function moored by anchors and lines. Finally, the Super Scoop was in place, not capable of motorized self-propelled movement, and any movement was only incidental to dredge work.[4] A finding of non-vessel status based on these facts falls squarely and consistently within the parameters of the Schoenbaum Test.

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4. A floating casino, a decided self-propelled non-vessel, arguably has more intended movement than does a non-self-propelled dredge. *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 1995 AMC 2038 (5th Cir. 1995).

D. *The Schoenbaum Test should be applied because it yields an efficient, fair, and predictable result*

A moored work platform dredge, such as the Super Scoop, is classified as a special purpose structure. In fact, the court below determined the Super Scoop was very obviously equipment used at a construction site.

The essential issue in this case is not whether the courts or statutes have adequately defined a vessel. Rather, the difficulty is determining whether a special purpose structure is a non-vessel. The Super Scoop is clearly not an ocean liner, crew boat, or a form of traditional maritime transportation. This has resulted in two largely disjunctive tests, both attempting to define a special purpose structure as a vessel or non-vessel.

As a special purpose structure, the Super Scoop easily falls within the parameters of the Schoenbaum Test as a non-vessel, and this Court may readily compare the Super Scoop dredge to similar work equipment. An easy comparison would be that of the Super Scoop dredge to a bulldozer or crane. A moored work platform dredge operates less like a ship at sea than like a bulldozer or crane that must be transported to a work site. The Super Scoop is certainly important to maritime commerce, but it has more in common with the machinery used to dredge and/or build the Suez Canal than it has in common with a ship transporting cargo or personnel. It is a device commonly used for construction, operating like a crane resting on the water rather than wheels. Like many special purpose structures, its function is primarily to serve as a work platform on which men and equipment can excavate earth or drill wells beneath them.

By employing the Schoenbaum Test, this Court will ensure other courts avoid the arbitrary nature of the vessel test, which requires a court to randomly determine whether a special purpose structure is a vessel, relying on the local prejudices of juries on a case-by-case basis. For example, the Ninth Circuit has held that so many factors go into determining what is a vessel that the issue must be left to the trier of fact on a case-by-case basis. *Martinez v. Signature Seafood, Inc.*, 303 F.3d 1132 (9th Cir. 2002). The ever-growing list of vessel factors is the harbinger of its arbitrary result. Should this Court look beyond the Schoenbaum Test and, instead, deem the Super Scoop a vessel despite its functional purpose, it would only be adding to previous inconsistent rulings. By applying the Schoenbaum Test, this Court will prevent future arbitrary results by directing other courts to determine whether a special purpose structure is a non-vessel based on its construction and functional purpose.

The arbitrary nature of Petitioner's argument is illuminated by the work performed in oil and gas development in a marine environment. It should be noted that the Jones Act and the Longshore and Harbor Workers' Compensation Act are both federal workers' compensation statutes. When Congress adopted the Longshore and Harbor Workers' Compensation Act for individuals working on the Outer Continental Shelf, Congress intended to provide coverage to workers on the Outer Continental Shelf involved in mineral development. 43 U.S.C. § 1331, *et seq*.

However, as a result of the theories argued by Petitioner, men involved in similar or same work on the Outer Continental Shelf, have been faced with uncertainty and double standards. For example, a stationary platform on the Outer Continental Shelf is not a vessel; but a "tender" moored to that platform solely to provide living facilities for workers and supplies for

the same stationary platform *is* a vessel. *Golden v. Rowan Cos., Inc.*, 778 F.2d 1022 (5th Cir. 1985). Essentially, two special purpose structures moored to each other and to the soil, involved in the same project, with the same perils, and possibly the same employer could arbitrarily provide different recoveries.

Like a bridge built from two sides of the river, there really is no possible meeting in the middle. The clear and fair answer is to adopt the Schoenbaum Test for all special purpose platforms.

V. Conclusion

This Court has a simple option in its review of this case: (1) apply an arbitrary vessel analysis dependent upon the prejudice of the fact-finder, which considers limitless fact scenarios to analyze special purpose structures; or (2) apply the Schoenbaum Test to fairly determine that special purpose platforms like the Super Scoop are not vessels. LaQuay urges this Court to follow the more reasonable and equitable Schoenbaum Test and deem special purpose work platforms to be non-vessels.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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